

AMENDED IN SENATE MAY 28, 2013

SENATE BILL

No. 569

Introduced by Senator Lieu

February 22, 2013

An act to add Section 859.5 to the Penal Code, and to add Section 626.8 to the Welfare and Institutions Code, relating to interrogation.

LEGISLATIVE COUNSEL'S DIGEST

SB 569, as amended, Lieu. Interrogation: electronic recordation.

Existing law provides that under specified conditions the statements of witnesses, victims, or perpetrators of specified crimes may be recorded and preserved by means of videotape.

This bill would require the electronic recordation of the entire custodial interrogation of a minor who is in a fixed place of detention, as defined, and who, at the time of the interrogation, is suspected of committing or accused of committing a specified offense. The bill would set forth various exceptions from this requirement, including if the law enforcement officer conducting the interrogation or his or her superior reasonably believes that electronic recording would disclose the identity of a confidential informant or jeopardize the safety of an officer, the individual being interrogated, or another individual. The bill would require the prosecution to show by clear and convincing evidence that an exception applies to justify the failure to make that electronic recording. The bill would also require the interrogating entity to maintain the original or an exact copy of an electronic recording made of the interrogation until the final conclusion of the proceedings, as specified.

The bill would require the Judicial Council to develop related jury instructions. ~~The bill would also require the Judicial Council to develop forms to survey interrogations and outcomes in order to ensure~~

~~compliance with these provisions, as specified. The bill would require the Department of Justice to develop forms to be submitted to the department in each case of an unrecorded interrogation in order to identify patterns of noncompliance.~~ The bill would make these provisions applicable to juvenile court proceedings, as specified. By imposing these new requirements on local law enforcement, this bill would impose a state-mandated local program.

The California Constitution requires the state to reimburse local agencies and school districts for certain costs mandated by the state. Statutory provisions establish procedures for making that reimbursement.

This bill would provide that, if the Commission on State Mandates determines that the bill contains costs mandated by the state, reimbursement for those costs shall be made pursuant to these statutory provisions.

Vote: majority. Appropriation: no. Fiscal committee: yes.
State-mandated local program: yes.

The people of the State of California do enact as follows:

- 1 SECTION 1. (a) The Legislature finds and declares the
- 2 following:
- 3 (1) According to a national study, false confessions extracted
- 4 during police questioning of suspects have been identified as the
- 5 second most frequent cause of a wrongful conviction. Although
- 6 threats and coercion sometimes lead innocent people to confess,
- 7 even the most standardized interrogations can result in a false
- 8 confession or admission. Mentally ill or mentally disabled persons
- 9 are particularly vulnerable, and some confess to crimes because
- 10 they want to please authority figures or to protect another person.
- 11 Additionally, innocent people may come to believe that they will
- 12 receive a harsher sentence, or even the death penalty, unless they
- 13 confess to the alleged crime.
- 14 (2) Three injustices result from false confessions. First, a false
- 15 confession can result in an innocent person being incarcerated.
- 16 Second, when an innocent person is incarcerated, the criminal
- 17 investigations end and the real perpetrator remains free to commit
- 18 similar or potentially worse crimes. Third, victims' families are
- 19 subjected to double the trauma: the loss of, or injury occurring to,
- 20 a loved one and the guilt over the conviction of an innocent person.
- 21 Mandating electronic recording of custodial interrogations of both

adults and juveniles will improve criminal investigation techniques, reduce the likelihood of wrongful convictions, and further the cause of justice in California.

(3) Evidence of a defendant's alleged statement or confession is one of the most significant pieces of evidence in any criminal trial. Although confessions and admissions are the most accurate evidence used to solve countless crimes, they can also lead to wrongful convictions. When there is a complete recording of the entire interrogation that produced such a statement or confession, the factfinder can evaluate its precise contents and any alleged coercive influences that may have produced it.

(b) For these reasons, it is the intent of the Legislature to require electronic recording of all custodial interrogations of ~~both adults and juveniles~~. Recording interrogations decreases wrongful convictions based on false confessions and enhances public confidence in the criminal process. Properly recorded interrogations provide the best evidence of the communications that occurred during an interrogation, prevent disputes about how an officer conducted himself or herself or treated a suspect during the course of an interrogation, prevent a defendant from lying about the account of events he or she originally provided to law enforcement, and spare judges and jurors the time necessary and the need to assess which account of an interrogation to believe.

SEC. 2. Section 859.5 is added to the Penal Code, to read:

859.5. (a) Except as otherwise provided in this section, a custodial interrogation of a minor, who is *in a fixed place of detention, and* suspected of committing ~~an~~ the offense listed in *paragraph (1) of* subdivision (b) of Section 707 of the Welfare and Institutions Code, shall be electronically recorded in its entirety. A statement that is electronically recorded as required pursuant to this section creates a rebuttable presumption that the electronically recorded statement was, in fact, given and was accurately recorded by the prosecution's witnesses, provided that the electronic recording was made of the custodial interrogation in its entirety and the statement is otherwise admissible.

(b) The requirement for the electronic recordation of a custodial interrogation pursuant to this section shall not apply under any of the following circumstances:

1 (1) Electronic recording is not feasible because of exigent
2 circumstances. The exigent circumstances shall be recorded in the
3 police report.

4 (2) The person to be interrogated states that he or she will speak
5 to a law enforcement officer only if the interrogation is not
6 electronically recorded. If feasible, that statement shall be
7 electronically recorded. The requirement also does not apply if the
8 person being interrogated indicates during interrogation that he or
9 she will not participate in further interrogation unless electronic
10 recording ceases. *If the person being interrogated refuses to record*
11 *any statement, the officer shall document that refusal in writing.*

12 (3) The custodial interrogation took place in another jurisdiction
13 and was conducted by law enforcement officers of that jurisdiction
14 in compliance with the law of that jurisdiction, unless the
15 interrogation was conducted with intent to avoid the requirements
16 of this section.

17 (4) The interrogation occurs when no law enforcement officer
18 conducting the interrogation has knowledge of facts and
19 circumstances that would lead an officer to reasonably believe that
20 the individual being interrogated may have committed ~~an~~ *the*
21 offense listed in *paragraph (1) of* subdivision (b) of Section 707
22 of the Welfare and Institutions Code for which this section requires
23 that a custodial interrogation be recorded. If during a custodial
24 interrogation, the individual reveals facts and circumstances giving
25 a law enforcement officer conducting the interrogation reason to
26 believe that ~~an~~ *the* offense listed in *paragraph (1) of* subdivision
27 (b) of Section 707 of the Welfare and Institutions Code has been
28 committed, continued custodial interrogation concerning that
29 offense shall be electronically recorded pursuant to this section.

30 (5) A law enforcement officer conducting the interrogation or
31 the officer's superior reasonably believes that electronic recording
32 would disclose the identity of a confidential informant or jeopardize
33 the safety of an officer, the individual being interrogated, or another
34 individual. An explanation of the circumstances shall be recorded
35 in the police report.

36 (6) The failure to create an electronic recording of the entire
37 custodial interrogation was the result of a malfunction of the
38 recording device, despite reasonable maintenance of the equipment,
39 and timely repair or replacement was not feasible.

1 (7) The questions presented to a person by law enforcement
2 personnel and the person's responsive statements were part of a
3 routine processing or booking of that person. Electronic recording
4 is not required for spontaneous statements made in response to
5 questions asked during the routine processing of the arrest of the
6 person.

7 (c) If the prosecution relies on an exception in subdivision (b)
8 to justify a failure to make an electronic recording of a custodial
9 interrogation, the prosecution shall show by clear and convincing
10 evidence that the exception applies.

11 (d) The presumption of inadmissibility of statements provided
12 in this section may be overcome, and a person's statements that
13 were not electronically recorded may be admitted into evidence
14 in a criminal proceeding or in a juvenile court proceeding, as
15 applicable, if the court finds that all of the following apply:

16 (1) The statements are admissible under applicable rules of
17 evidence.

18 (2) The prosecution has proven by clear and convincing evidence
19 that the statements were made voluntarily.

20 (3) Law enforcement personnel made a contemporaneous audio
21 or audio and visual recording of the reason for not making an
22 electronic recording of the statements. This provision does not
23 apply if it was not feasible for law enforcement personnel to make
24 that recording.

25 (4) The prosecution has proven by clear and convincing evidence
26 that one or more of the circumstances described in subdivision (b)
27 existed at the time of the custodial interrogation.

28 (e) Unless the court finds that an exception in subdivision (b)
29 applies, all of the following remedies shall be granted as relief for
30 noncompliance:

31 (1) Failure to comply with any of the requirements of this section
32 shall be considered by the court in adjudicating motions to suppress
33 a statement of a defendant made during or after a custodial
34 interrogation.

35 (2) Failure to comply with any of the requirements of this section
36 shall be admissible in support of claims that a defendant's statement
37 was involuntary or is unreliable, provided the evidence is otherwise
38 admissible.

39 (3) If the court admits into evidence a statement made during a
40 custodial interrogation that was not electronically recorded in

1 compliance with this section, the court, upon request of the
2 defendant, shall give to the jury cautionary instructions. The
3 Judicial Council shall develop jury instructions that are
4 substantially similar to the following jury instruction:

5
6 “The law requires the electronic *video* recording of interrogations
7 by law enforcement officers when a defendant is charged with ~~an~~
8 *the* offense listed in *paragraph (1) of* subdivision (b) of Section
9 707 of the Welfare and Institutions Code. This is done to ensure
10 that you will have before you a complete picture of the
11 circumstances under which an alleged statement of a defendant
12 was made in a custodial setting so that you may determine whether
13 a statement was, in fact, made in that custodial setting and
14 accurately recorded. If there is a failure to electronically record an
15 interrogation, you have not been provided with a complete picture
16 of all the facts surrounding the defendant’s alleged statement and
17 the precise details of that statement. By way of example, you
18 cannot hear the tone or inflection of the defendant’s and
19 interrogator’s voice, or hear first hand the interrogation, both
20 questions and responses, in its entirety. Instead you have been
21 presented with a summary based upon the recollections of law
22 enforcement personnel. Therefore, you should weigh the evidence
23 of the defendant’s alleged statement made in a custodial setting
24 with great caution and care as you determine whether the statement
25 was, in fact, made in that custodial setting, and, if so, whether it
26 was accurately reported by the state’s witnesses, and what, if any,
27 weight it should be given in your deliberations.

28 You have heard evidence that the defendant made a statement
29 to a law enforcement officer in a custodial setting and that the
30 statement was not recorded. You are the exclusive judge as to
31 whether the defendant made the statement in that custodial setting,
32 and as to what was actually said.

33 You must first decide whether the defendant, in fact, made that
34 statement in a custodial setting, in whole or in part. Among the
35 factors you may consider in deciding whether the defendant
36 actually made the alleged statement in a custodial setting is the
37 failure of law enforcement officials to make an electronic recording
38 of the interrogation conducted and the alleged statement itself. The
39 fact that a law enforcement officer did not comply with the law
40 requiring the electronic recording of the reported statement shall

1 be considered by you as a circumstance tending to show that the
2 statement was not made in that custodial setting.

3 If you find that the defendant did make the statement in that
4 custodial setting, you must view the statement, as reported, with
5 caution, because unrecorded oral statements made by a defendant
6 out of court to a law enforcement officer should be viewed with
7 caution. The failure of the law enforcement officer to comply with
8 the law requiring recording of the reported statement shall also be
9 considered by you as a circumstance bearing on the weight and
10 credibility to be given to the officer's account of the statement.

11 The presence of an electronic recording that is recorded in its
12 entirety permits, but does not compel you to conclude that the
13 prosecution has proven that a statement was, in fact, given and
14 that the electronically recorded statement was accurately reported
15 by the prosecution's witnesses."

16
17 (f) The interrogating entity shall maintain the original or an
18 exact copy of an electronic recording made of a custodial
19 interrogation until a conviction for any offense relating to the
20 interrogation is final and all direct and habeas corpus appeals are
21 exhausted or the prosecution for that offense is barred by law or,
22 in a juvenile court proceeding, as otherwise provided in subdivision
23 (b) of Section 626.8 of the Welfare and Institutions Code. The
24 interrogating entity may make one or more true, accurate, and
25 complete copies of the electronic recording in a different format.

26 ~~(g) (1) Compliance with the electronic recording requirement~~
27 ~~shall be monitored by the Judicial Council. The Judicial Council~~
28 ~~shall develop forms to survey interrogations and outcomes and to~~
29 ~~identify any patterns of noncompliance with the requirements of~~
30 ~~this section. These forms shall be completed and submitted by the~~
31 ~~judge and the prosecutor to the Judicial Council for any of the~~
32 ~~following cases:~~

33 ~~(A) Cases in which recorded interrogations were introduced as~~
34 ~~evidence in a criminal proceeding.~~

35 ~~(B) Cases in which interrogations were not recorded, but were~~
36 ~~nonetheless introduced as evidence in a criminal proceeding.~~

37 ~~(C) Cases in which interrogations were recorded and a plea of~~
38 ~~guilty to a felony offense was entered and accepted by the court.~~

39 ~~(D) Cases in which interrogations were not recorded and a plea~~
40 ~~of guilty to a felony offense was entered and accepted by the court.~~

~~(2) Compliance with the electronic recording requirement shall also be monitored by the Department of Justice. The Department of Justice shall develop forms for purposes of identifying any patterns of noncompliance. The forms shall describe the charges against the person, the location where the interrogation took place, and the exception listed in subdivision (b) that was the primary basis for the failure to record the interrogation. These forms shall be completed and submitted to the department by the interrogating officer or officers in each case of an unrecorded interrogation, regardless of whether the electronic recording is presumed inadmissible into evidence under this section, or is in fact inadmissible under this section.~~

~~(h)~~

(g) For the purposes of this section, the following terms have the following meanings:

(1) “Custodial interrogation” means any interrogation in a fixed place of detention involving a law enforcement officer’s questioning that is reasonably likely to elicit incriminating responses, and in which a reasonable person in the subject’s position would consider himself or herself to be in custody, beginning when a person should have been advised of his or her constitutional rights, including the right to remain silent, the right to have counsel present during any interrogation, and the right to have counsel appointed if the person is unable to afford counsel, and ending when the questioning has completely finished.

(2) “Electronic recording” means ~~an audio or a~~ video recording that accurately records a custodial interrogation.

(3) “Fixed place of detention” means a fixed location under the control of a law enforcement agency where an individual is held in detention in connection with a criminal offense that has been, or may be, filed against that person, including a jail, police or sheriff’s station, holding cell, correctional or detention facility, juvenile hall, or a facility of the Division of Juvenile Facilities.

(4) “Law enforcement officer” means a person employed by a law enforcement agency whose duties include enforcing criminal laws or investigating criminal activity, or any other person who is acting at the request or direction of that person.

SEC. 3. Section 626.8 is added to the Welfare and Institutions Code, to read:

1 626.8. (a) Subdivisions (a) to (d), inclusive, paragraphs (1)
2 and (2) of subdivision (e); and ~~subdivisions~~ *subdivision* (g) ~~and~~
3 ~~(h)~~ of Section 859.5 of the Penal Code shall apply to any custodial
4 interrogation of a person who is or who may be adjudged a ward
5 of the juvenile court pursuant to Section 602 related to ~~an~~ *the*
6 offense described in *paragraph (1) of* subdivision (b) of Section
7 707.

8 (b) (1) Except as otherwise provided in paragraph (2), Article
9 22 (commencing with Section 825) shall apply to any electronic
10 recording or other record made pursuant to this section.

11 (2) The interrogating entity shall maintain an original or exact
12 copy of any electronic recording made of a custodial interrogation
13 until the person is no longer subject to the jurisdiction of the
14 juvenile court, unless the person is transferred to a court of criminal
15 jurisdiction. If the person is transferred to a court of criminal
16 jurisdiction, subdivision (f) of Section 859.5 of the Penal Code
17 shall apply. The interrogating entity may make one or more true,
18 accurate, and complete copies of the electronic recording in a
19 different format.

20 SEC. 4. If the Commission on State Mandates determines that
21 this act contains costs mandated by the state, reimbursement to
22 local agencies and school districts for those costs shall be made
23 pursuant to Part 7 (commencing with Section 17500) of Division
24 4 of Title 2 of the Government Code.